

CHOOSING LEADERSHIP JUDGES BY STATE SUPREME COURT APPOINTMENT: ANALYSIS OF A COURT REFORM

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I INTRODUCTION

State trial courts are led and ultimately managed by judges. These “leadership” judges are given different titles: presiding judge, chief judge, administrative judge, and assignment judge. The duties of a leadership judge vary between jurisdictions but generally include overseeing the court’s interaction with the community, state and local bar associations, government agencies, and other branches of government. The leadership judge is responsible for the administration of the court, which can include assigning of chambers and caseloads, overseeing human resource and personnel matters, implementing policy direction from the state’s supreme court or administrative office of the courts, and maintaining organizational norms such as work hours, standards of collegiality, and quality of work.¹ Leadership judges may also be part of the governance structure of the judicial branch as a whole.

But judges, generally, are not professional managers. Courts typically do not choose leadership judges based on their proven skill as managers. Rather, lawyers are chosen to be judges based on their skills as lawyers and politicians. Judges are selected for management positions based primarily on seniority, popularity, and success as judges. Thus, a judge’s leadership skills are usually unknown and are only a secondary concern when making leadership choices. In many states, managing judges are given no training on the administrative issues they will need to tackle.

Effective leadership judges must be able to persuade their colleagues that they have the experience and ability to lead the court. They need the leadership and management skills to persuade the judges they supervise to follow in the

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1. See, e.g., Renee Cohn Jubelirer, *Communicating Disagreement Behind the Bench: The Importance of Rules and Norms of an Appellate Court*, 82 LAW & CONTEMP. PROBS. no. 2, 2019 at 103 (discussing the role of organizational norms on appellate court decision-making).

direction the leadership judge and the chief justice intend to take the court. It is essential that leadership judges create and maintain a court culture that supports leadership decisions for the good of the whole institution. As part of the governance structure of the judicial branch as a whole, trial court leaders also play a critical role in the overall management of the state's courts and in ensuring that the chief justice hears their court's problems and concerns.

However, measuring success as a leadership judge differs based on the needs of each constituency being served. From the perspective of the line judges, the job of a leadership judge is primarily to guarantee the autonomy of the other judges in their courtrooms, obtain adequate resources for the operation of the court, and maintain the reputation of the court. From the perspective of the bar, the litigants, the public officials, and the agencies who work with the court, management success can be viewed as the efficient operation of the court and the provision of ready access to court services. A well-managed court timely disposes of its cases to meet its customers' expectations. Mistakes or long delays in processing cases results in public criticism and calls for leadership change. The chief justice and the state court administrator expect the leadership judge to be part of the management team, supporting the goals of the judicial branch as a whole, even if those goals conflict with the interests of the line judges.

The method of choosing leadership judges has implications for whether such judges work to optimize the satisfaction of the judges they manage, as opposed to prioritizing the satisfaction of the court's customers or the organizational norms imposed on the court by the supreme court or the judicial branch. Election by peers may motivate a leadership judge to manage with the goal of keeping his colleagues happy. A judge elected by his peers likely has their trust and confidence, an essential for effective management. But peer elections are also more likely to result in a judge chosen because of seniority or popularity instead of management competence. Appointment of leadership judges by the chief justice reflects a closer coupling with and thus better adherence to organizational norms, such as standardized case disposition times, alignment of trial court initiatives with the state supreme court's strategic agenda, and judicial branch solidarity in confronting legislative and executive branch challenges. It lessens the likelihood of choosing a manager with little or no management experience or ability. Similarly, a leadership judge appointed by the executive or legislative branch might result in a court that is more responsive to other agencies or branches of government. But such a judge also might give less weight to the goal of an independent judiciary. Each selection method has the potential to shape the direction of the court differently, as there is inherent tension between the expectations of the various constituencies.

In twenty-three states, general jurisdiction trial courts choose their leaders by peer election. As recently as the 1970s, peer election was viewed as "the only viable selection technique," even recognizing its drawbacks.² Thirteen of the

2. LARRY BERKSON ET AL., *MANAGING THE STATE COURTS* 168 (1977).

remaining states either choose the most senior judge or leave the selection to another branch of government. But even in states that use a similar method for selecting leadership judges (i.e. peer election), the process of making the selection varies. Some states require a secret ballot for their election. Other states let the individual circuit or division choose the method of selection, allowing different sized courts to use the method that best suits their needs.³

The leadership judges in fourteen states are chosen by either that state's chief justice, or by the state's highest court as a whole. This paper examines those fourteen states and the evolution of their method of choice.⁴ Section II surveys some of the institutional differences in unification between those courts. Section III compares the process that each state uses to choose the leadership judge. Section IV considers, based on interviews with leadership judges, how the judge's role is defined and the management duties given to that judge. Finally, Section V considers whether the variations in each state's process have any implications for the management of the courts and concludes that supreme court selection of leadership judges better serves the management goals of a unified judicial branch and better integrates the concerns of local courts into the management of the judicial branch.

II

JUDICIAL INDEPENDENCE AND THE EVOLUTION OF COURT MANAGEMENT

A. State Courts as Loosely Coupled Organizations

As a society, we choose successful lawyers to be judges. We look to their reputation for integrity, their knowledge of the law, their skill in trial. From those judges we choose the managers for our courts. We choose the most senior of the judges, or the most popular, or the ones who have demonstrated skill at judging. What we typically do not do is choose leadership judges based on their proven skill as managers. Lawyers generally are not trained as managers and have developed management skills incident only to the necessity of managing a law office. Similarly, judges are not trained as managers, and the management experience gained in running an office made up of a judge, a bailiff, and a judicial assistant is hardly adequate preparation for leadership a bureaucracy, which in a large court might consist of hundreds of employees and multi-million dollar budgets. So why are judges chosen to manage the judicial branch?

The answer lies in concepts of judicial independence—decisional independence for individual judges, and institutional independence for the

3. For example, Connecticut's Chief Justice chooses a Chief Court Administrator who then chooses a chief judge.

4. Authority to choose leadership judges is vested in the supreme court as a whole in some states and solely in the chief justice in others. Unless speaking specifically about a court, the supreme court will be referred to. Leadership judges in different states have different titles. Presiding judge and chief judge are most common, but assignment judge and administrative judge are also used. I refer to them all as the leadership judge, by which I mean the judge appointed by the supreme court to exercise administrative responsibility over the district to which he or she is assigned.

judiciary as a whole. State courts have many of the characteristics of loosely coupled organizations, that is, one in which the various components of the organization view themselves as independent decision-makers.⁵ One characteristic of a loosely coupled organization is that individuals retain autonomy from the larger organization.⁶ Judges view themselves as independent, and the court's governance structure must account for that institutional value. Conversely, as the role of courts in society has grown and management of state courts has moved from individual courts to a centralized, statewide administrative office of the courts, a separate management structure requiring uniformity and accountability has arisen.⁷ Court governance structures have evolved to reflect the need for professional management in the context of an independent judiciary both at the statewide and local levels. This places the independence of individual judges at considerable tension with the judicial branch's need to enforce organizational norms and to hold employees accountable.⁸

B. Judicial Independence

A core value of the judiciary is judicial independence—the authority of an individual judge to make decisions without interference. Independence in decision-making is necessary to maintain public trust and confidence in the fairness of the courts. For courts to be fair, and to be perceived as fair, judges must be free to make decisions based only on the facts and the law of each case. As Alexander Hamilton said in Federalist No. 78, “The Constitutional protections of judicial independence were instrumental and expedient to secure a steady, upright, and impartial administration of the laws.”⁹ Stated differently, “[j]udges need independence, not for their own sake, but because an essential protection of public liberty was having judges decide cases on the basis of legal principles alone.”¹⁰

Judges view their independence to make decisions as sacred. “When efforts to gain administrative efficiencies at the expense of this value collide, the judicial demand for independence most often does and should prevail.”¹¹ As Lefever points out, this conflict between management and autonomy is generally resolved by choosing a member of the bench to be the manager.¹² As a fellow judge, such

5. Gordon Griller, *Governing Loosely Coupled Courts in Times of Economic Stress*, in FUTURE TRENDS IN STATE COURTS 2010 48 (2010).

6. Mary Campbell McQueen, *Governance: The Final Frontier*, in EXECUTIVE SESSION FOR STATE COURT LEADERS IN THE 21ST CENTURY 2 (2013).

7. Griller, *supra* note 5, at 48.

8. *Id.*; McQueen, *supra* note 6.

9. THE FEDERALIST NO. 78 (Alexander Hamilton).

10. RUSSELL WHEELER, JUDICIAL ADMINISTRATION: ITS RELATION TO JUDICIAL INDEPENDENCE 13 (1998).

11. R. Dale Lefever, *The Integration of Judicial Independence and Judicial Administration: The Role of Collegiality in Court Governance*, 24 CT. MANAGER 5, 7 (2009).

12. *Id.* at 9.

a manager is perceived as sharing the value of decisional independence. However, as noted above, judges are not trained as managers, and the creation of a properly managed judicial branch resulting in the institutional independence of the judiciary—as opposed to that of individual judges—is a fairly recent occurrence.

C. Evolution of Court Management¹³

To understand why some states have given their supreme courts the authority to choose leadership judges, it is useful to consider how our current structures of court management evolved. Until the early 1900s, each court and judge was organizationally independent from other courts but dependent on other governmental entities. As Chief Justice Taft is quoted as saying: “each judge paddled his own canoe.”¹⁴ There was no administrative or management structure and no centralized provision of resources for the operation of the courts as part of the judicial branch.

“At the turn of the century, both state and federal courts depended heavily on the executive branch for administrative support and were subject to detailed regulation by the legislative branch. Rudimentary court management was supplied by the clerks who handled court records and sometimes scheduled court cases. In the state courts the clerks were usually elected and often viewed themselves as independent of the judiciary.”¹⁵

In those days, the courts were hardly an independent institution.

Credit for striking “the spark that kindled the white flame of progress”¹⁶ starting the movement to improve court management is generally given to Roscoe Pound.¹⁷ In his 1906 speech to the American Bar Association, Pound detailed the inadequacies and inefficiencies of the state and federal judicial systems. “Each state has to a great extent its own procedure. But it is not too much to say that all of them are behind the times.”¹⁸ Pound proposed a single unified court structure in each state, governed by responsible, flexible, and business-like administration¹⁹ with a chief justice to have administrative control over the whole system.²⁰ That unified court should have an appellate branch, a general jurisdiction branch, and a limited jurisdiction branch. Each judicial

13. “The administration of justice contributes, more than any other circumstance, to impressing upon the minds of people affection, esteem, and reverence towards their government.” – THE FEDERALIST NO. 78 (Alexander Hamilton).

14. Fannie J. Klein, *A Brief Summary of the Development of the Federal-State Court Systems*, in THE IMPROVEMENT IN THE ADMINISTRATION OF JUSTICE 2 (Fannie J. Klein ed., 6th ed. 1981).

15. *Id.* at 11.

16. John H. Wigmore, *Roscoe Pound's Saint Paul Address of 1906, the Spark That Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE SOC'Y 176 (1937).

17. *Id.* at 15.

18. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. AM. JUDICATURE SOC'Y 178, 178–87 (1937).

19. HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT (Steven W. Hays & Cole H. Graham eds., 1993).

20. Klein, *supra* note 14, at 3.

branch should “have a responsible head charged with the duty of immediate superintendence who should remain finally *responsible to the chief justice*.”²¹

In the 1930s, Arthur Vanderbilt sought to introduce the Pound objectives in his home state of New Jersey.²² Vanderbilt became president of the American Bar Association in 1938 and created, along with John Parker, the ABA section on judicial administration.²³ Vanderbilt published *Minimum Standards of Judicial Administration* in 1949,²⁴ just prior to establishing the Institute of Judicial Administration at New York University in 1952.²⁵ Subsequently, as Chief Justice of New Jersey, Vanderbilt was able to implement most of these reforms outlined in the Minimum Standards.²⁶

In his book, *Creating the Judicial Branch: The Unfinished Reform*, Robert W. Tobin noted the necessity of such reforms for real judicial independence.²⁷

“A few appellate judges equipped with legal weaponry do not constitute a judicial branch, nor are they truly independent. The judicial branch is not a coequal branch of government unless it has the ability and the authority to manage its internal operations, including its largest single component, the trial courts. When this important component of the judiciary is part of local government and local politics, there is no state judicial branch in any meaningful sense of the word. This was the situation around 1950 when judicial leaders and court reformers started to take cognizance of the relative anarchy that prevailed in trial courts and the detachment of state supreme courts from this problem.”²⁸

Similarly, former Utah Chief Justice Michael Zimmerman reported:

“When I was appointed to the Utah Supreme court in 1984, it was probably fair to say that the state’s judiciary was a separate branch of government in name only. It had no institutional leadership, lacked an administrative infrastructure, did no coordinated planning, and was funded from a variety of sources, state and local, all of which gave each of its parts a rather parochial character. The Supreme Court had no governance role over the system and little history of interest in it.”²⁹

By the 1950s state courts had “developed an increased awareness of the judicial branch as an administrative entity.”³⁰ This prompted court unification reforms, including simplification of organizational structure, more centralized administration, and unitary statewide budgeting.³¹ As Tobin described it, trial courts were to be removed from local government control and moved to a statewide judicial branch directed by the supreme court with the assistance of a professional manager. That system was to be funded, if possible, by the state. Judges would be chosen by merit selection, subject to a judicial disciplinary

21. *Id.* at 9 (emphasis added).

22. *Id.* at 7.

23. ROBERT W. TOBIN, AN OVERVIEW OF COURT ADMINISTRATION 18 (1997).

24. THE LAW CENTER OF NEW YORK UNIVERSITY, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION (Arthur T. Vanderbilt ed., 1949).

25. Klein, *supra* note 14, at 10.

26. BERKSON ET AL., *supra* note 2.

27. ROBERT W. TOBIN, CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM (2004).

28. *Id.* at 21.

29. Michael D. Zimmerman, *A New Approach to Court Reform*, 82 JUDICATURE 108 (1998).

30. TOBIN, *supra* note 23, at 18–19.

31. *Id.* at 19.

system and taught through judicial education programs. “Underlying these reforms was the unspoken premise that unless the top judicial leaders actually have and use the authority to put the judicial house in order, then the judiciary does not deserve to be called a third branch of state government.”³²

To varying degrees, many states have adopted such reforms. A 2008 study found that “one third of the states have a court system that conforms closely to the original unification model as proposed by the American Bar Association.” However, Tobin laments that there has been little advance toward court unification “in the last twenty years.”³³ The National Center for State Courts reports twenty-six states that describe themselves as “unified” in their constitution, statutes, or case law.³⁴

III

COMPARISON OF SELECTED ASPECTS OF STATES WITH SUPREME COURT SELECTION OF MANAGERS

Self-description notwithstanding, what makes a court system unified? Berkson and Carbon described five elements of unification reform: consolidation and simplification of court structure; centralized management of the judicial system; centralized rulemaking; centralized budgeting; and state financing.³⁵ The fourteen states studied in this Article all have some variation of a unified model. This section compares the similarities in unification among states in which the supreme court chooses its leadership judges, starting with when the reforms were adopted.

A. Timing of Court Reform Adoption

The process of adopting court reform measures to unify state courts, including court appointment of leadership judges, began in 1947 in New Jersey. New Jersey’s 1947 Constitution “broke the paradigm of weak, ineffectual court systems By enabling rulemaking authority in the Supreme Court and centralizing executive powers in the Chief Justice as administrative head of the courts, the New Jersey Constitution gave birth to the modern court system, one capable of self-management and inner direction.”³⁶ However, New Jersey implemented additional changes in the early 1980s, making the courts state-funded, instead of dependent on the county freeholder boards, and consolidating

32. TOBIN, *supra* note 27, at 23.

33. Kimbrough et al., *The Verdict Is In: Judge and Administrator Perceptions of State Court Governance*, 35 JUST. SYS. J. 344, 345 (2014).

34. *Court Unification*, NAT’L CTR. FOR STATE COURTS, [https://www.ncsc.org/Topics/Court-Management/Court-Unification/State-Links.aspx?cat=States%20Legally%20Described%20as%20Unified#New York](https://www.ncsc.org/Topics/Court-Management/Court-Unification/State-Links.aspx?cat=States%20Legally%20Described%20as%20Unified#New%20York) [https://perma.cc/Y59J-YFY5] (last visited Feb. 12, 2019).

35. See LARRY BERKSON ET AL., NAT’L INST. OF LAW ENF’T & CRIMINAL JUSTICE, *COURT UNIFICATION: HISTORY, POLITICS AND IMPLEMENTATION* (1978).

36. Robert D. Lipscher, *A Tribute to Chief Justice Wilentz*, 49 RUTGERS L. REV. 683, 683 (1997).

the court into one system accountable to the chief justice himself.³⁷

Maine and Alaska unified their courts in the 1950s. In 1959, Alaska adopted statehood and its first constitution, choosing a unified court system with supreme court selection of leadership judges when it adopted its constitution in 1959 at the time of statehood. In the 1960s, Arizona, Colorado, Iowa, New York, Michigan, and Kansas adopted unification reforms. Although the “apex of the unification movement” occurred in the 1970s, supported by the federal government,³⁸ only the four remaining court appointment states, South Carolina, South Dakota, Vermont, and Wisconsin, adopted their reforms in that decade, with Oregon implementing unification in 1981.

B. Consolidation of Courts

The number of levels of courts a state has serves as an indicator of how a state has unified its court system. As noted above, traditionally, trial courts were managed as individual courts. That required them to be reliant on external entities for administrative support, such as lawyers for scheduling and sheriffs for bailiffs—making the court less independent. Consolidation and simplification of court structure for administrative efficiency has been described as the “heart of court unification.”³⁹ Consolidation of fragmented, separate, trial courts into a streamlined structure allows for the centralization of administrative resources and consistent operations and management of the courts.⁴⁰ States that have one general jurisdiction court or one general jurisdiction court and one limited jurisdiction court are most consolidated, while the least consolidated states have three or more limited or special jurisdiction courts.⁴¹

All fourteen of the states studied have a general jurisdiction trial court that is ultimately managed by and responsible to the supreme court. Almost all have an intermediate court of appeals. The differences in degree of consolidation lie primarily in the number of limited jurisdiction and specialty jurisdiction courts in the state. Of the courts that also choose leadership judges, Alaska, Kansas, Iowa, Maine, New Jersey, South Dakota, Vermont, and Wisconsin would be considered consolidated. Arizona, Colorado, Michigan, Oregon, and South Carolina are slightly less consolidated. Only New York is relatively unconsolidated. Overall, the consolidated general jurisdiction trial courts fit well into a unified court model.

C. Centralized Rulemaking and Administrative Authority Vested in the Supreme Court

One hallmark of a unified court is that the authority to govern the judicial

37. *Id.* at 687.

38. BUREAU OF JUSTICE ASSISTANCE, COURT UNIFICATION PROGRAM BRIEF 9 (Apr. 1988).

39. BERKSON ET AL., *supra* note 35, at 4.

40. See generally THOMAS A. HENDERSON ET AL., NAT'L INST. OF JUSTICE, THE SIGNIFICANCE OF JUDICIAL STRUCTURE: THE EFFECT OF UNIFICATION ON TRIAL COURT OPERATIONS (Mar. 1984).

41. Victor E. Flango, *Court Unification and Quality of State Courts*, 16 JUST. SYS. J. 33, 39, 42 (1994).

branch is vested in the supreme court. All the courts studied vested administrative responsibility and authority in the supreme court. The majority of those states enshrined such authority in their constitution. The constitutions of Alaska,⁴² Arizona,⁴³ Colorado,⁴⁴ Iowa,⁴⁵ Kansas,⁴⁶ Michigan,⁴⁷ New Jersey,⁴⁸ New York,⁴⁹ South Carolina,⁵⁰ South Dakota,⁵¹ Vermont,⁵² and Wisconsin⁵³ each give the state's supreme court the authority to promulgate rules governing the administration of all the state's courts. Only Maine⁵⁴ and Oregon⁵⁵ granted administrative authority in statute.

Of course, a supreme court with the power to make its own administrative rules has the power to choose leadership judges. Interestingly, only the constitutions of Arizona, Colorado, and South Dakota include provisions that expressly give the supreme court authority to appoint leadership judges. Alaska, Maine, Oregon, and Vermont authorize the supreme court to appoint leadership judges by statute. Kansas, Michigan, New Jersey, New York, South Carolina, and Wisconsin establish the court's authority to appoint leadership judges by court rule.

Interestingly, in 2014, Kansas passed a statute empowering district court judges in the judicial district to elect chief judges, in what is known as a peer election.⁵⁶ This occurred as part of an ongoing dispute between the Kansas Supreme Court and the Kansas Legislature. The Kansas Supreme Court held the statute unconstitutional as violative of the separation of powers doctrine of the U. S. and Kansas constitutions.⁵⁷

D. Authority and Responsibility of the Leadership Judge

The duties of the leadership judge and extent of their authority differs among states. Some states give a general statutory grant of authority to the leadership judge. Some of those states supplement the formal description of the leadership judge's duties by court rule or administrative order. Most states are quite specific as to the duties created. For instance, Alaska's statute enumerates the general

42. ALASKA CONST. art. IV, § 15.

43. ARIZ. CONST. art. VI, § 11 (addition approved by election Nov. 8, 1960, eff. Dec. 9, 1960).

44. COLO. CONST. art. VI, § 21.

45. IOWA CONST. art. V, § 4.

46. KAN. CONST. art. III, § 1.

47. MICH. CONST. art. VI, § 5.

48. N.J. CONST. art. VI, § 2, para. 3.

49. N.Y. CONST. art. VI, § 28.

50. S.C. CONST. art. V, § 4.

51. S.D. CONST. art. V, § 11.

52. VT. CONST. ch. II, § 37.

53. WIS. CONST. art. VII, § 4.

54. 1961 Me. Laws 689.

55. OR. REV. STAT. ANN. § 1.003 (West 2013).

56. KAN. STAT. ANN. § 20-329 (West 2015).

57. *Solomon v. State*, 303 Kan. 512 (2015).

duties of the leadership judge “in addition to regular judicial duties.”⁵⁸ The leadership judge is to assign the cases to the judges in the district; supervise the judges and their court personnel in carrying out their duties; and “expedite and keep current the business of the court.”⁵⁹ Conversely, as noted above, Arizona’s constitution provides only that the leadership judge “shall exercise administrative supervision over the superior court and judges thereof in their counties, and shall have other duties as may be provided by law or by rules of the supreme court.”⁶⁰ Specific leadership judge duties are set forth in court rule.⁶¹

The National Center for State Courts provides a compendium of the responsibilities of leadership judges indexed by state.⁶² Of the states considered therein, Maine did not provide data, and Michigan and Vermont do not specify leadership judge duties. With the exception of New Jersey and South Carolina, all of the states authorize leadership judges to assign judges to specific divisions of the court. All except New York give leadership judges the authority to assign special cases to judges, and all except Colorado authorize leadership judges to hear cases themselves in addition to their administrative duties. Only South Carolina does not allow leadership judges to establish special committees. Colorado, New Jersey, South Dakota, and Wisconsin specifically authorize leadership judges to carry a reduced caseload because of their administrative role, although in practice other states allow a reduced caseload depending on the size of the court. Only Colorado and Oregon do not specifically authorize the leadership judge to manage visiting judges, that is, judges brought in to hear conflict cases. Arizona, Alaska, Colorado, Oregon, South Dakota, and Wisconsin allow the leadership judge to select quasi-judicial officers such as commissioners and judges pro tempore. Excepting South Carolina, all states require the leadership judge to supervise the court’s fiscal affairs and supervise non-judicial employees. Of particular interest, only Iowa, Kansas, New Jersey, New York, and South Dakota provide for extra compensation for leadership judges.

E. State Financing of Courts and Centralized Budgeting

Another element of unification is centralized state funding of the judicial branch. State funding and a unified budget have been described as “crucial for the effective functioning of administrative unification.”⁶³ State funding, as opposed to local funding or a hybrid between state and local funding, allows for central administration and budget planning. State funding provides a centralized mechanism for distributing resources and for allocating those resources in a

58. ALASKA STAT. ANN. § 22.10.130 (West 1959).

59. *Id.*

60. ARIZ. CONST. art. VI, § 11.

61. ARIZ. SUP. CT. R. 92.

62. NAT’L CTR. FOR STATE COURTS, RESPONSIBILITIES OF THE PRESIDING JUDGE, [data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=\[https://perma.cc/8CJZ-NP9U\]](http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=[https://perma.cc/8CJZ-NP9U]) [(last visited Jan. 31, 2019)].

63. BUREAU OF JUSTICE ASSISTANCE, DEP’T OF JUSTICE, COURT UNIFICATION, PROGRAM BRIEF 3 (1988).

manner not dictated by the income limitations or political whims of individual counties. Arguably, courts with state-provided funding are more independent, or at least present a united front against local attacks on independent judicial decision-making. According to the National Center for State Courts, general jurisdiction trial courts in Alaska, Colorado, Iowa, Michigan, Oregon, South Carolina (except for probate courts), South Dakota, and Vermont are state-funded. Arizona and Kansas have a hybrid local and state funding system.⁶⁴ Each of the states studied has a judicial branch budget prepared and submitted by either the state's highest court, its chief justice, the Administrative Office of the Courts, judicial council, or a combination thereof.⁶⁵

F. Merit Selection System for Choosing Judges

One potential measure of the quality of a state court is whether litigants in that state choose to litigate in state court instead of the federal court when that choice is available. Using that measure, “merit selection and nonpartisan election, compared to other methods is associated with court quality.”⁶⁶ Eight of the states that use court selection of leadership judges—Alaska, Arizona, Colorado, Iowa, Kansas, Maine, South Dakota, and Vermont—also select their judges with some form of merit selection of trial judges. Arizona and Kansas directly elect trial judges in some counties; in Arizona the largest counties use merit selection. New Jersey and Maine use gubernatorial appointment with senate confirmation; Maine has a nominations board created by executive order. South Carolina judges are elected by the legislature. Michigan, Oregon, and Wisconsin judges are elected in a nonpartisan general election. Only New York elects its trial judges solely in partisan elections.

Judicial performance review provides a means for judges to be evaluated by an independent committee or commission to provide voters information at election time.⁶⁷ Alaska, Arizona, Colorado, Iowa, all merit selection states, and New Jersey, which uses gubernatorial appointment with senate confirmation, provide for judicial performance review.⁶⁸

64. NAT'L CTR. FOR STATE COURTS, TRIAL COURT FUNDING FOR SELECTED EXPENDITURE ITEMS, data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=https://perma.cc/EK6U-LYML] (last visited Jan. 31, 2019).

65. NAT'L CTR. FOR STATE COURTS, PREPARATION AND SUBMISSION OF THE JUDICIAL BRANCH BUDGET, data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=https://perma.cc/YA4X-K5VJ] (last visited Jan. 31, 2019).

66. Flango, *supra* note 41, at 46.

67. In Arizona, for instance, every voter is mailed a pamphlet which includes the commission's evaluation on whether the judge meets judicial standards along with survey data on the judge's legal ability, integrity, communication skills, judicial temperament and administrative performance.

68. NAT'L CTR. FOR STATE COURTS, JUDICIAL PERFORMANCE EVALUATION, data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=https://perma.cc/43LW-C5KT] (last visited Jan. 31, 2019).

G. Summary

Because all of the states that adopted judicial selection of leadership judges did so as part of larger court reforms, it is perhaps unsurprising that each of the states also has a fairly high degree of unification. Except for New York, each of the courts are consolidated. Each has a judicial branch managed by a chief justice or a supreme court and an Administrative Office of the Courts led by a state court administrator. A majority choose their judges by merit selection. All have central budgeting and at least some state funding of their courts. All have the administrative authority to manage their own branch of government, most under a specific provision of their constitution. It is logical that such top-down leadership and management would also exercise the authority to choose its own managers and give them a role in the policy direction of the judicial branch.

IV

THE METHOD OF CHOOSING LEADERSHIP JUDGES AS ONE ASPECT OF A UNIFIED STATEWIDE GOVERNANCE SYSTEM

One aspect of creating a unified state judicial branch is the creation of a governance structure. As discussed above, that governance structure must strike a balance between judicial independence and judicial accountability. For the purpose of management, the trial courts in state judicial branches are generally broken down into subdivisions, much in the way a large corporation is divided into divisions or subsidiaries, and are created based on natural political subdivisions, population, or both. The names given to these subdivisions vary by state.⁶⁹ Like corporate divisions, in a unified court typically one of the judges is chosen to serve as a manager. Most states, and all fourteen states considered here, choose a member of the bench to be the leadership judge and, in all but the smallest courts, appoint a court administrator to handle administrative tasks.

Initially, a review of state constitutional provisions, statutes, and court rules for each of the fifty states was completed to ascertain the method of selection of leadership judges for each level of court. But this framework of statutes and rules does little to explain how the selection of leadership judges impacts the operation of a state's court and judicial branch. I concluded that the actual experience of judges and court administrators on the various aspects of the role of leadership judges, in their own words, would be the most effective way to learn about the impact of the differences in the various states. I began with Arizona presiding judges and court administrators who consented to be interviewed. I then started cold calling judges in other states to arrange for interviews. Additionally, at the National Association of Presiding Judges and Court Executives meeting, I arranged interviews with several leadership judges. I also made contact with representatives of the National Center for State Courts (NCSC), who graciously arranged a number of interviews.

69. Many states refer to them as districts. In Arizona they are county-based and named for their county. In New Jersey, they are called vicinages.

The interviewees were not chosen at random. They tended to be from larger courts. Since several of them were referred by the NCSC, they are likely judges who worked successfully with the NCSC and thus have some familiarity and buy-in with NCSC principles of management. Accordingly, there is some possibility of selection bias.

Ultimately, I interviewed twenty-eight judges and administrators. Among them were eight state and county court administrators, five of whom served as the state court administrator for one or more states. Two of the state court administrators and three of the county court administrators had worked in peer election states. I interviewed four line judges and sixteen leadership judges. Two of the line judges and two of the leadership judges were from peer election states. The remainder served in supreme court selection states. The interviews were audiotaped with the interviewees' permission and then transcribed by a court reporter.

How then are managers to be chosen? As Professor Friesen writes, “[this is] a complex and challenging problem in judicial administration.”⁷⁰ While a few states have one-off methods, some involving other branches of government, the most common method of selecting leadership judges is election by the leadership judge's peers. A few states select by seniority—the longest serving judge is the manager. Fourteen states have their supreme court or chief justice choose the managers.

A. Selection by Seniority

A minority of states choose leadership judges by seniority. However, according to two interviewees, at least two states which ostensibly choose by peer election instead elect the leadership judge by electing the longest serving judge, without regard for management ability. By tradition, judges in those courts tacitly agree that other judges will not seek the job and that they will vote for the longest-serving judge. Seniority is generally viewed as a poor method of choosing managers. As one commentator notes: “This arrangement often militates against vigorous administration.”⁷¹ Berkson and others point out that managers chosen by seniority are by definition often older than their colleagues and thus possibly less energetic.⁷² There is no guarantee, or even consideration, of administrative skill or expertise. Likewise, there is no consideration of whether the senior judge has the support of his fellow judges or will support the initiatives and policies of the supreme court.

70. ERNEST FRIESEN, EDWARD GALLAS & NESTA GALLAS, *MANAGING THE COURTS* 139 (1971).

71. LARRY BERKSON, STEVEN HAYS & SUSAN CARBON, *MANAGING THE STATE COURTS* 168 (West, 1977) (quoting Henry P. Chandler, Edward C. McConnell, & Leland T. Tolman, *Administering the Courts – Federal, State, and Local*, 42 J. AM. JUDICATURE SOC'Y 13, 16 (1958)).

72. *Id.*

B. Selection by Peer Judge Election

The most widely used method of selection is election by the leadership judge's fellow judges serving on the court in that county or district. Both Friesen and Berkson find this to be the best selection method.⁷³ In support of their opinions, they argue that a leadership judge who is elected by her colleagues is guaranteed the support of a majority of the judges and is in a "natural position" to ask for the support and cooperation of her fellow judges.⁷⁴ But Berkson notes that "elections have occasionally been used to select a weak administrative judge who is not likely to upset the managerial status quo."⁷⁵ Or as a state court administrator put it: "You know, they elect somebody not to disrupt or disturb the court, to keep the status quo, because the majority of judges may like the status quo. So that's a problem, I think, with electing judges from your fellow judges."

Leadership judge interviewees agreed with the necessity for the support of the line judges. But they think they have such support because of their management skill, not popularity. As one leadership judge said: "I have thought that it would be very difficult to be the chief judge if you did not have the support of your judges. That's one of the things, every two years, that I think about as to whether I want to continue is, if I lose the support of the judges, that's a time when I would probably not apply."

Another potential problem with selecting judge managers by peer election arises from the election process. With an election comes a campaign. All of the state court administrators interviewed confirmed that campaigns take place. Candidate judges make promises regarding what programs they will support, how they will assign the caseloads, who will get which courtrooms, and where the budget will be spent. An implicit motivation for line judges is: "I'm going to make sure I'm going to pick somebody that is not going to send me to Siberia." In one example, a majority of judges in the district switched from one political party to another. They then chose a new leadership judge from their party. This, of course, raised serious concerns about the basis on which this partisan manager would act.

The peer election process and its aftermath create a real possibility of developing factions in the court. As an appointed leadership judge said about the peer election process, "It just has the potential of really dividing the bench. This way, [court selection] it is out of our hands. If they're going to be upset at somebody, it's not going to be the fellow judges who didn't vote their way. They're going to be upset at the supremes."

A corollary problem arises from the difficulty of having to manage the judges that elected you while maintaining sufficient popularity to get reelected. An appointed chief judge outlined the problem well: "I think that peer elections, the benefit of that is that a person becomes a chief judge because they have the

73. FRIESEN ET AL., *supra* note 70, at 140; BERKSON ET AL., *supra* note 71.

74. BERKSON ET AL., *supra* note 71.

75. *Id.*

respect of their peers. On the other hand, in order to stay there as a chief judge, you have to, you know, maybe not be willing to drop the hammer when it needs to be dropped because you are reliant upon these people to keep you there.”

It is important to note that, by definition, while a popularly elected leadership judge has the support of a majority of his fellow judges, that choice may be based on popularity and not necessarily on skill as a manager. Appointed leadership judges felt strongly about this issue, noting that popular elections can result in the election of judges who are well-liked but have no management or leadership skills. Likewise, single-issue candidates may be elected who have no interest in managing the court other than to address the one issue motivating them.

C. Selection by Supreme Court or Chief Justice

Justice William Brennan, who served on the New Jersey trial and appellate bench, was a proponent of court unification.⁷⁶ He described the management of state courts in business terms: “The chief justice of the highest state court constitutes the executive head of the system, the chairperson of the board, the president, and the leadership judges of each trial court district correspond to the vice presidents or branch managers of a large business.”⁷⁷ Like a corporation, to efficiently manage the judicial branch the chief justice should be able to “choose presiding judges who would operate at his direction rather than in accordance with the expectations of their peers as is the case in a decentralized system where the choice and tenure of presiding judges generally rests with the members of the local courts.”⁷⁸

Appointment by the supreme court emphasizes leadership “based on competency, not seniority or rotation.”⁷⁹ Additionally, as Tobin notes, where the leadership judge is the supreme court’s appointee, that judge “become[s] important in the vertical lines of authority extending from the court of last resort into the trial courts.”⁸⁰ Supreme court appointment also avoids the problem of a manager having to impose sanctions on the judges who elected her. “Because an appointed chief judge does not serve at the pleasure of the other judges of the trial court, he or she is free to make hard decisions that might be difficult in a more collegial environment.”⁸¹

Nonetheless, Friesen, *et al.* argue that there is little difference between choosing a manager based on appointment and choosing one based on seniority.⁸² The state court administrators interviewed for this paper took a more nuanced view. They argue that the method of selection is less important than the

76. James A. Gazell, *Justice Brennan’s Reflections on Judicial Modernization*, 10 RUTGERS-CAM L.J. 1, 8 (1978) (footnotes omitted).

77. *Id.*

78. *Id.* at 10.

79. Kimbrough et al., *supra* note 33, at 349.

80. ROBERT TOBIN, NAT’L CTR. FOR STATE COURTS, AN OVERVIEW OF COURT ADMINISTRATION 32 (1997).

81. *Id.*

82. FRIESEN ET AL., *supra* note 70, at 140.

judiciary's governance structure. Either selection method will work, so long as the judges chosen to be managers have or are taught management and leadership skills and are given a voice in the management of the judicial branch overall. It is not empirically clear whether one method tends to produce better leadership judges than another."⁸³ On the other hand, it seems likely that leadership judges chosen specifically for their demonstrated leadership skills, by the chief executive of the judicial branch and as part of his or her management team, have a greater likelihood of being effective leaders.

V

COMPARISON OF SELECTED ASPECTS OF SUPREME COURT SELECTION OF LEADERSHIP JUDGES

A. Governance Structure

"Governance structure" describes the division of responsibility and authority between the chief justice, the administrative office of the courts, and the various divisions of the judicial branch. The governance structure should allow judges and court employees to be confident in their leadership and should give legitimacy to management decisions. Meaningful judicial independence and effective judicial administration should be the goals of court governance.⁸⁴

Each state with court-chosen leadership judges also has some type of council of leadership judges with varying levels of authority to recommend policy and to receive input from the chief justice. In New Jersey, for instance, the assignment judges meet monthly with the chief justice, the state court administrator, the trial court administrator, and presiding judges representing each of the case types. It is considered an honor for a presiding judge to be asked to attend and is considered an audition with the chief to be chosen as an assignment judge. In Michigan, the chief judges meet as a committee to consider policy issues and make recommendations to the supreme court. Members of the supreme court may attend the meetings, but the meeting is chaired by a chief judge chosen by his or her peers. In Arizona, the presiding judges meet quarterly with the chief justice and the vice-chief justice. An Arizona judge described those meetings as having two purposes: "One is to hear from [the chief justice] and others on the supreme court as to what direction do you see the state court system moving in, what are you looking at for the state court system; but, to me, just a bigger advantage is it gets all the presiding judges together. So there's a social aspect there, but it's really the ability to bounce ideas off of them." The opportunity to discuss problems and initiatives with a group of peers is perceived as very helpful.

Some states, such as New Jersey and Iowa, call the meeting of leadership judges the "judicial council." Other states, such as Arizona, have a separate judicial council that includes other stakeholders in the judicial branch such as

83. Kimbrough et al., *supra* note 33, at 346.

84. Lefever, *supra* note 11, at 6.

clerks of court, court administrators, judges from limited jurisdiction courts, lawyers, law school deans, and even lay members of the public. Some judicial councils are democratic, and the majority vote governs the policy of the judicial branch. Others view the judicial council as merely advisory. Several judges expressed variations of the view that “really, there’s only one vote in the room, it’s the chief justice.” On the other hand, most of the interviewees believed that while the final decision rested with the supreme court, “they do listen to us pretty well.” Each of the courts considered in this article, except Vermont, have a judicial council. Arizona’s and New Jersey’s judicial councils makes court policy, while the remainder are advisory.⁸⁵

Similarly, depending on the size of the court, the leadership judge will have an executive committee or council made up of divisional presiding judges, or selected judges, and court administrators. This body serves as the management team for the district. It serves both to receive input from the various divisions of the court to assist in making management decisions and to obtain buy-in from those affected by the decisions.

It is important to note that although such committees or councils are convened to include the interests of trial judges and administrators in the decision-making process, with few exceptions they are advisory and not binding on the judicial branch leadership. Moreover, in nearly all of those states, the trial court-level representatives on central decision-making bodies are selected by the chief justice or the state supreme court as a whole. As a result, at least one commentator suggests that these central decision-making bodies, even when they have real decision-making authority, may not be seen as acting in the interests of the line judges.⁸⁶ Presumably, this view recognizes that leadership judges will act in the interest of the judicial branch as a whole, not just as a representative of their court.

B. The Process Used in Choosing Leadership Judges

“No doubt the justices will consider administrative skills, ability to work with fellow judges, vigor, tact, and decisiveness among the criteria by which these . . . very important [presiding judge] selections will be made.”⁸⁷

1. Written Application, Letter of Interest, or Personal Contact

Initially, the supreme court must identify potential court leaders—judges who

85. NAT’L CTR. FOR STATE COURTS, JUDICIAL COUNCILS AND CONFERENCES, ROLES AND ADVISORY CAPACITY, [data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO/qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=\[https://perma.cc/PJ6A-SFPW\]](http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO/qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=[https://perma.cc/PJ6A-SFPW]) (last visited Jan. 31, 2019). Maine and New York did not provide information. Wisconsin has a separate judicial conference which does make policy.

86. Kimbrough et al., *supra* note 33, at 356–57.

87. Morris K. Udall, *Modern Courts-Where Do We Go from Here*, 2 ARIZ. L. REV. 167, 170–71 (1960). “The complexity of modern court administration demands a set of skills not part of traditional judicial selection and training. Selection methods for judicial leaders should explicitly identify and acknowledge those skills.” NAT’L CTR. FOR STATE COURTS, PRINCIPLES FOR JUDICIAL ADMINISTRATION (July 2012).

have both the skills and the interest in serving as a leadership judge. That process varies widely. Michigan and Iowa use a formal written application. In Iowa, the application must be submitted, even when only one judge is interested. Some states, like Arizona and Wisconsin, require a letter of interest. Others simply want an email or phone call expressing interest in being considered. Several judges reported being solicited to apply either by their fellow judges or by the supreme court. Of course, in districts with only one⁸⁸ or a few judges, the choice is generally obvious.

2. Due Diligence Process—How Are the Candidates Vetted?

Once potential candidates are identified, the court must engage in some process to determine which of the candidates are most likely to have the leadership and management skills required. Similarly, a supreme court with a robust governance structure will also be looking for the judge mostly likely to champion the supreme court's policies and to willingly be part of the management team.

Again, the due diligence methods used varied widely from state to state. One state has a formal due diligence process in which opinions are solicited from the district judges, the district court administration, the District Attorney, the Public Defender, the Chief Probation Officer and County Commissioners and County Managers. The chief justice then interviews the candidates and a formal report is given to the full supreme court before a decision is made.

At the other end of the spectrum, judges from several states reported that either there was no due diligence process at all, or that it was idiosyncratic to the sitting chief justice. A number of judges reported some variation of, "Look, this is a small state, and they (the justices) know us."

Along the same lines, there is a distinct trend across the states to elevate deputy or associate leadership judges to be leadership judges. Like service as a deputy, service on court committees or task forces provides an opportunity for judges to become known and, for potential or aspiring managers, to demonstrate their skill set.

Notwithstanding the appointment method, judges described problems with this process. One judge noted that the chief justice of the state simply had no interest in court administration. As that judge put it, "He just wants to decide cases." Even worse, a judge from another state reported that, "The difficulty has been that the decision has not always been based on merit, sometimes it was the eldest, most senior judge that would likely retire from the position. So, it was kind of just a mark of recognizing that judge as he prepares for retirement." In other words, seniority was substituted for skill as a manager.

3. Do Judges Campaign?

As noted above, judges in peer election states sometimes campaign to be the manager. Appointment states are not immune. Soliciting supporters among the

88. Three counties in Arizona have only one judge.

district judges to lobby the justices was reported in one state. Interestingly, several leadership judges, somewhat ruefully, said that they were the only applicant for the job, which suggested that serving as the leadership judge was burdensome or unpopular.

C. Term of Service—Is the Term Renewable?

According to the NCSC, “[t]he minimum effective term length for a chief justice or presiding judge is no less than two years. A term of less than two years does not allow the judicial leader to set goals and effectively implement action plans.”⁸⁹ As Professor Friesen points out, “Judicial leadership discontinuity destroys programmatic continuity and sound planning based on good research. *Progress stops with each change in judicial leadership.*”⁹⁰ Accordingly, consideration should be given to allowing leadership judges to serve successive terms. On the other hand, the need for new energy and fresh ideas suggest that service in perpetuity is not good policy.

Based on the interviews, term lengths are generally short, but renewable. For instance, South Carolina has a six-month term. New York has a one-year term, renewable each year with the judge receiving an annual review. Oregon, Iowa, Kansas, and Wisconsin have two-year renewable terms. Arizona has a three-year term, presumptively renewable once. Vermont has a four-year term. New Jersey has no set term—assignment judges hold their position until retirement, with rare exceptions. South Dakota leadership judges serve at the pleasure of the chief justice.

D. Does the Leadership Judge Carry a Caseload?

Well, I’ve always worked on a theory that you never ask anybody to work harder than you are working. You know, the longer you are on the bench, the longer you realize how cheap words are.

Many leadership judges choose to carry a caseload as a leadership function. This may or may not be a good idea. The NCSC suggests that without some provision for caseload adjustment, leadership judges may think it necessary to carry a full caseload either to manage the court’s overall caseload or to maintain their credibility with the line judges. NCSC’s best practice is to “presume a caseload adjustment for the leadership judge without prescribing the size of the adjustment.”⁹¹

The experience of the court administrators interviewed, unsurprisingly, was that the division between handling a caseload and administrative duties was based in large measure on the size of the court. As one court administrator noted, “A lot of states have one 800-pound gorilla and one 400-pound gorilla, and then

89. NAT’L CTR. FOR STATE COURTS, KEY ELEMENTS OF AN EFFECTIVE RULE OF COURT ON THE ROLE OF THE PRESIDING JUDGE IN THE TRIAL COURTS 4 (June 2006).

90. Ernest Friesen, *Court Leaders: Survivors or Agents of Change*, in F.M. GRILLER & E.K. STOTT, AM. BAR ASS’N, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 37 (7th ed. 2001) (emphasis added).

91. NAT’L CTR. FOR STATE COURTS, *supra* note 89, at 8.

a bunch of monkey courts. I don't mean that negatively, but size-wise. It's very different jobs in those different places. So, leadership [of] a big court is a lot different from leadership [of] a two-judge court." Intuitively, the bigger the court, the more likely that the leadership person has more administrative duties and less trial duties. "Maybe they call calendars and assign cases, but they don't try cases themselves."

On the other hand, the leadership judges interviewed almost uniformly carried some cases. This was to keep current with the functioning of the court, but more importantly was seen as an important leadership function. In addition to the quote above, as one leadership judge said, "I did two months a year in family [court], just to show the troops that I would do that."

E. Did the Leadership Judge Receive Management Education?

INTERVIEWER: Has the court ever provided you with any management training?

LEADERSHIP JUDGE: Nope.

The literature on court administration emphasizes the need for training leadership judges in principles of court management. For instance, the NCSC's Principles for Judicial Administration provides: "Because management responsibilities for leadership judges will continue to increase, educational opportunities to develop increased proficiency in technology, case, personnel and financial management should be available and encouraged."⁹²

The court administrators reported that some states have a detailed leadership curriculum, though many do not. They also mentioned the newly created National Association of Presiding Judges and Court Executive Officers (NAPCO) as a source for management related information and education for leadership trial judges and court administrators.

The reported experience of the leadership judges interviewed was that they received virtually no training for their management role. Most of the judges served as the associate or deputy leadership judge and thus obtained some management experience. Several had prior business experience or management education prior to becoming a judge. But none reported a formal program to train them for their duties as the leadership judge.

92. NAT'L CTR. FOR STATE COURTS. *supra* note 89, at 15.

F. Measures of Leadership Judge Effectiveness

“Well, I would say lack of lawsuits would be one of them.”

LEADERSHIP JUDGE: “The guy that [I replaced] made me look good. He was so bad. I went in and everything was going to have to be better.

INTERVIEWER: It’s easier to look good if your predecessor was a jerk?

LEADERSHIP JUDGE: Yeah. Totally. That should have been like written on my wall in my office.

One way to assess whether the court governance system, including the method of choosing leadership judges, is optimal is to find empirical measures of court and leadership judge effectiveness. Such measures might include case disposition times, clearance rates, and numbers of cases per court and judge as a percentage of the population served. But while a few courts claim to be numbers-driven, most courts have neither quality data nor a framework for assessing their data. Due to wide variation in statistical reporting systems, cross-jurisdiction comparison of court performance is difficult, if not impossible. Because there is no valid, uniform empirical method of judging performance, this section reflects leadership judges’ answers to the question: “How do you know whether you are doing a good job as the leadership judge?”

Leadership judges report paying close attention to caseload statistics, case disposition times, and other objective measures of performance. They also mention other measures of administration generally, like being able to efficiently manage the court’s budget, engaging in strategic planning, implementing policy change efficiently, and fostering innovation.

Uniformly, the leadership judges mentioned the quality of their relationship with the line judges as a measure of effectiveness. As one judge said, “Generally, you know, the fewer complaints I get from judges is probably one of the big measures.” And another: “[The line judges] want to do well. They want to be well thought of. They don’t want to be beaten down and, you know, thought of as, you know, a black hole draining of resources without giving anything back. I think we did that.”

G. The Leadership Judge’s Role in Supporting the Line Judges

LEADERSHIP JUDGE: I need to be able to explain what you’re [the line judge] doing. And if I can’t do that, I need to be able to explain *you*.

LEADERSHIP JUDGE: The judges ask me, “Do you work for us, or for the evil empire?”

Leadership judges uniformly described supporting the line judges as a key part of their job. They recognized that not only is supporting the judges important in and of itself, it is crucial as a leadership function: “They [the line judges] have to know that you can make decisions, that you’re making decisions that they agree with, or even if they don’t buy into it 100 percent, they understand why you are making that decision. So I think it’s more that you have to have credibility because I think if you lose credibility, then they’re—they’re not going to keep you then, they’re not going to row in the same direction.”

All of the judges interviewed spoke of the importance of providing

information about the operation of the court to the line judges. Some leadership judges hold regular bench meetings with all of judges in addition to executive committee meetings with divisional managers. They travel to outlying courthouses for lunch or breakfast just to solicit input or hear concerns. Many of them spoke of having an “open door” policy for judges to come in and ask about anything. Providing regular information and soliciting input on management issues is perceived as being a critical leadership tool.

Leadership judges also see their role as one of a protector and as a coach or mentor—trying to help judges be better. “I am a fierce protector and fighter for the judiciary, but I am really, really able to have very frank conversations with all of the judicial officers about our mission, our responsibilities and duties, and suggest very strongly, if necessary, where we can do better, and then come up with some ways how that can be actualized.” They are also a resource for judges who get into trouble. As one leadership judge said: “Well, if I had a nickel for every judge that I plucked out of a fire, I would be really rich.” Judges who have problems in getting their work done, or with their demeanor or with ethics complaints are encouraged to seek help from the leadership judge. This includes personal and family problems. As one leadership judge told his fellows: “I will back you up every way I can, and I will never ever say no to you. If you say, ‘I have got a problem, I got this with my family,’ that comes first. And I just—that’s because we work together and if we’re not all working together than what are we doing?”

Even though they are not popularly elected, the leadership judges interviewed viewed maintaining the support of the line judges as critical. They clearly regarded supporting their judges as one of the most important of their duties. Uniformly, the leadership judges were committed to providing the resources and support to allow their judges to do their jobs and to do them well.

H. Management Style

LEADERSHIP JUDGE: I’ve learned that saying in a meeting with a group of judges: “I can’t believe we’re arguing about something so f***ing juvenile,” is not good management.

LEADERSHIP JUDGE: You know, generally people see me as being fair. Fair does not always mean that you get what you want.

Most of the leadership judges interviewed seemed surprised when asked if they had a management style. As one said: “That’s probably the first time ‘style’ was ever used in anything I’ve ever done.” Uniformly they spoke about collaboration and a consensus management style. For example, one said, “I like to get everyone’s viewpoints. I don’t care where they fall in the hierarchy of things. I want to hear everybody’s viewpoints. And so even if it’s someone who theoretically reports to me, I’m still interested in getting their viewpoints.” Others described themselves as “open to a fault,” and “open and accessible.”

Likewise, all of the judges emphasized that while they would consider the input they received, they made their own decisions. As one said, “I always go in thinking, ‘I can learn something here and let’s hash it out. At the end, it is my

decision and you're expected to follow, but I want your input.'" The leadership judges were keenly aware that they could not just order their fellow judges to do something—they had to persuade and build consensus amongst the bench. Many held regular meetings to solicit the line judges' views and to explain management decisions. Interestingly, a minority of the managers I spoke to would defer to the will of the majority: "So I try to let them get their—say their piece and then, you know, sometimes just have to decide. But I will not stand in the way of the majority—the clear majority in a particular issue. There have been a couple things I wasn't real crazy about, but I've let them happen, and it hasn't been a big problem."

1. Enforcement Methods

LEADERSHIP JUDGE: We had a judge bring his dog into the courthouse, keep him in his chambers. You know, stupid stuff.

LEADERSHIP JUDGE: So, if you threaten them, ultimately, that's all I've ever had to do.

LEADERSHIP JUDGE: What is it that I can do for you that can get you out of this mess?

Perhaps surprisingly, leadership judges are extremely reluctant to impose any kind of sanction or discipline on their fellow judges. They recognize that they are only first among equals and that punishment carries with it severe collegiality costs. The ultimate sanction for a leadership judge is to file a complaint with the state's judicial discipline committee. Only one of the judges interviewed had ever done so. Another described it as "the nuclear weapon, you don't want to drop that more than once. But I have that option." In New Jersey, after the first seven years of service, a judge is eligible for tenure, or appointment by the legislature to serve until retirement. In egregious examples of misconduct or incompetence, the leadership judge will oppose tenure.

Judges interviewed split on the use of assignment as a sanction. Some would try never to use assignments "as a tool in the toolbox." Others would move a judge from a location, a caseload, or a specific case for perceived misbehavior or incompetence. Leadership judges did recognize that certain judges were not competent or efficient in handling certain types of cases and would assign judges accordingly.

The most commonly described tool to manage judge behavior was persuasion. Leadership judges understood the old management adage "to reprove privately." Unanimously, leadership judges would meet individually with judges having difficulties and offer assistance if possible. Notwithstanding their relationship with the supreme court, none described use of the supreme court's power as a management tool.

VI

CONCLUSIONS AND RECOMMENDATIONS FOR FURTHER STUDY

In recent history, states have sought to improve the management and overall efficiency of their judicial branches. To best achieve these goals, many states have

looked to court unification and a governance structure that is centrally managed by a chief justice and state court administration. Along these same lines, fourteen states have mandated the supreme court appointment of leadership judges.

Foremost, the leadership judges appointed by the supreme court were very aware of their role as part of the management team for the entire judicial branch. They understood the need and the importance of providing the supreme court with input on local needs and to weigh in on policy initiatives for the benefit of the judicial branch as a whole. Once the supreme court decided on a policy, the managers recognized the obligation to support and implement the policy in their courts and to explain it and sell it to the judges they supervised. They viewed themselves as management; as one said, part of the “evil empire.”

Fundamentally, supreme court appointment allows the chief justice in a unified state court system to create his or her management team, made up of individuals with recognized management and leadership skills who agree to serve at the chief’s request. Such managers are less likely to be “shop stewards” for their fellow judges, as one court administrator put it, and more likely to be effective middle managers who cooperate with the chief executive officer of the courts.

Unlike a peer election system, the process of selection allows the chief to pick judges that he or she can work with and to obtain a commitment to the chief justice’s direction and strategic agenda for the judicial branch. Based on the interview data, this selection method does not appear to diminish the perceived support from the line judges for the leadership judge, nor does it diminish the commitment by the leadership judges to support the line judges. The judges interviewed, most chosen by the supreme court, clearly understood the need for maintaining the support of their line judges and identified leadership tools to get that support. More importantly, those judges, even though not popularly elected, were keenly aware of the need to support and mentor the judges they supervised.

The relationships between the various judges, courts, administrators, and stakeholders are increasingly recognized as being as important for the function of the judicial branch, if not more so than the formal organizational structure. As Mary Campbell McQueen suggests, courts “need to create some leadership mechanism for acknowledging the voices of local judges.”⁹³ Allowing the chief justice to choose his or her leadership team serves to better integrate the individual trial courts into the judicial branch as a whole. Including the trial court leadership as part of the judicial branch management team gives the chief justice’s representative from that court a direct voice to report local problems and concerns. It gives local trial courts direct input in the direction the branch chooses to address local problems. It better allows the judicial branch to speak with one voice in each of the districts throughout the state and to present a united front in clashes with other branches of government.

93. MARY CAMPBELL MCQUEEN, NAT’L CTR. FOR STATE COURTS, GOVERNANCE: THE FINAL FRONTIER (2013).

Supreme court selection of leadership judges is not a panacea. As one court administrator, quoted above, said, the governance structure matters. Clearly, the best governance structure imaginable, including the best method of choosing leadership judges, makes little difference if the chief justice has no interest in managing or leading the judicial branch, or if he uses his appointment authority to choose friends or to reward long service with no consideration of management ability. But supreme court selection at least gives a unified judicial branch the choice of selecting the best possible leaders to further the objectives of the branch.

Much research remains to be done on the various aspects of effective management of judges. As in most loosely coupled organizations, the leadership judge has few means of forcing compliance. Leadership, persuasion, and an appeal to a higher ethical standard are the leadership judge's stock-in-trade. Interviews with line judges as to what they find effective would for make an interesting and useful study.

As court data systems improve and as courts adopt common standards for measuring performance, it will be easier to identify common performance indicators such as workloads, case weights, time standards, public opinion surveys, and staffing metrics. These will allow empirical analysis of court performance can also create a perspective for seeing the relationship between the parts and encourage sharing best and emerging practices across boundaries. Likewise, "performance data can reinforce the system's ability to govern itself and help counter attempts by the other branches of government to erode its independence."⁹⁴

Ultimately, as McQueen writes, recognizing that courts are loosely coupled organizations is just the beginning of the analysis. "Loose coupling recognizes the numerous dimensions and complexities of organizations populated with semi-autonomous professionals such as judges, where the governance structure is not only vertical (the judicial system) but also horizontal (trial courts)."⁹⁵ Optimizing the existing organizational models to create better collaboration between the supreme court, the state court administrator, leadership judges, trial judges, and court personnel is the likely next step in improving court efficiency and flexibility to meet new challenges and to maintain the judiciary as a fully functioning independent branch of government.

94. *Id.* at 9.

95. *Id.* at 11.